



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

September 9, 2009

Maria E. Macario
California Regional Water Quality Control Board,
Santa Ana Region
3737 Main Street, Suite 500
Riverside, CA 92501

Re: Draft MS4 Permit for San Bernardino County and Incorporated
Cities within San Bernardino County (NPDES Permit No. CAS618036)

Dear Ms. Macario:

The following are EPA Region 9's comments on the July 10, 2009 draft permit for discharges from the Municipal Separate Storm Sewer System (MS4) serving San Bernardino County and incorporated cities within San Bernardino County (NPDES Permit No. CAS618036).

EPA supports adoption of the draft permit, with a few relatively minor revisions and clarifications as described below. The following also provides our support for the draft permit's incorporation of Total Maximum Daily Loads (TMDLs).

A. Fact Sheet

Page 7 of 42 in Fact Sheet overstates the Clean Water Act's exemptions for discharges from agricultural sources. This text should be revised to: "However, the CWA specifically excludes discharges composed entirely of return flows from irrigated agriculture and nonpoint source agricultural activities."

B. LID Requirements

Over the last eighteen months, EPA Region 9 has been working with the Santa Ana Regional Board and other Boards in California on the development of clear, measurable, and enforceable permit requirements for the implementation of Low Impact Development (LID). We commend the Santa Ana Regional Board for the LID provisions in the recently re-issued Orange County MS4 permit (NPDES Permit No. CAS618030).

We also support the LID provisions in the draft MS4 permit for San Bernardino County, as they are consistent with the Orange County MS4 permit mentioned above.

However, in defining conditions that would not represent a hydrologic condition of concern, Part XI.E.6.d.ii.b (page 75 of 114) of the draft San Bernardino County permit refers to post-development hydrology that “is not significantly different” from pre-development hydrology. A numeric percentage should be included, as has been done in the Orange County permit and the draft Riverside County permit public noticed on July 23, 2009 (NPDES Permit No. CAS618033), to clarify what is meant by “not significantly different.”

C. Total Maximum Daily Loads (TMDLs)

EPA supports the draft permit’s incorporation of TMDLs. The draft permit is consistent with the approach taken in the MS4 permit recently adopted by the Santa Ana Board for Orange County. In order to protect water quality in Orange County, that permit requires compliance with Waste Load Allocations (WLAs) for urban runoff for well over 50 pollutant/water body combinations during the five year term of the permit.

It’s worth noting that in contrast to the Orange County permit, neither of the two TMDLs incorporated into the draft San Bernardino permit has compliance dates within the five year term of the permit. The draft permit provides ample opportunity for the permittees to prepare for compliance with the two applicable TMDLs by December 31, 2015.

The two TMDLs incorporated into the draft San Bernardino permit are the Middle Santa Ana River (MSAR) Bacteria TMDL and the Big Bear Lake Nutrient TMDL. We are pleased to see the applicable Waste Load Allocations (WLAs) incorporated into this draft permit in a manner consistent with the Orange County permit, as numeric effluent limits. As with the draft permit’s LID provisions, the inclusion of these numeric limits results in clear, measurable, and enforceable permit requirements. It is our view that this approach provides greater assurance of consistency with the WLAs than alternatives that have been used in the past. One alternative, which has been apparently suggested by critics of the draft San Bernardino permit, would simply require implementation of Best Management Practices (BMPs) which are theorized to be sufficient for compliance with WLAs, rather than including numeric requirements. We disagree with this alternative approach.

We understand that Board staff have received arguments against the incorporation of WLAs as numeric effluent limits. We also understand that these arguments have cited a November 22, 2002 EPA guidance document entitled, “Establishing Total Maximum Daily Loads (TMDLs) Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on those WLAs” in contending that municipal stormwater permits should not include numeric effluent limits. Please note that this EPA guidance states that when a non-numeric limit (i.e. a BMP-based limit) is imposed in a permit, “the permit’s administrative record, including the fact sheet when one is required, needs to support that the BMPs are expected to be sufficient to implement the WLA in the TMDL.” In general, we have found that permitting agencies typically do not have the necessary supporting documentation in the permit’s administrative record to demonstrate

that specific BMPs are expected to be sufficient to implement WLAs. Specifically in this case, the Administrative Record for this draft permit does not provide technical documentation demonstrating that specific BMPs would achieve the WLAs. Thus, the draft permit is consistent with EPA's guidance that a permitting agency may use numeric effluent limits where the record does not demonstrate that non-numeric BMP controls will be sufficient to implement the WLA.

Additionally, when considering the national stormwater program, it's important to recognize that EPA's November 22, 2002 guidance reasonably reflected program knowledge after approximately a decade of implementing the Clean Water Act's stormwater provisions. The guidance envisioned that adjustments such as more stringent controls might be necessary in the future to protect water quality. It is nearly seven years later. In areas like the Santa Ana Region, where the fourth generation of Phase I municipal stormwater permits are being issued, both Board staff and EPA recognize that municipal stormwater discharges continue to be a potentially significant cause of water quality impairments. Thus we support the Region in its efforts to include MS4 permit conditions that are increasingly prescriptive to ensure water quality is protected.

We also understand that critics of the draft permit have alleged that water quality-based effluent limits should not be included in this permit because they cannot be revised should applicable water quality standards for the receiving waters be revised. Board staff have informed us that it has been argued that EPA's "anti-backsliding rules" would prevent a permit from being modified to reflect new water quality standards. Without making a judgment about whether or not a change to water quality standards would be approved by EPA, it's important to recognize that water quality-based effluent limits derived from a TMDL and WLA may generally be modified when the WLA is revised, provided antidegradation requirements are met. For additional information see EPA's NPDES Permit Writers' Manual (EPA-833-96-003), Chapter 10, which is available at: http://cfpub.epa.gov/npdes/pubs.cfm?program_id=0.

In conclusion, the draft permit's approach for incorporating WLAs as numeric limits is appropriate, and we strongly recommend against making any revisions to the draft permit that would make the TMDL provisions inconsistent with this Board's Orange County MS4 permit.

We also have the following additional comments related to the specific TMDL requirements in the permit.

(1) Middle Santa Ana River (MSAR) Bacteria TMDL

Part V.D.1.d.ii refers to a "triennial bacterial source reduction." Please clarify if the term in the permit is referring to the review of the bacterial TMDLs, wasteload and load allocations (WLA & LA) every three years by the Regional Board in conjunction with the state's triennial review. We suggest the San Bernardino County MS4 permit include language similar to the draft MS4 permit for Riverside County, which also

incorporates WLAs from this TMDL (see Part VI.C.1.d.ii of the Riverside County permit).

Part V.D.1.d.iv.c of the draft MS4 permit for San Bernardino County requires updates in the 2010 annual report and each “triennial review year” thereafter describing revisions to the municipal stormwater management plan (MSWMP), local implementation plan (LIP) and WQMP which may be needed to meet the TMDL requirements. As part of improving information communicated to the Regional Board, we recommend more frequent (annual) reporting as found in the draft Riverside County permit, as well as more detailed descriptions of the actions taken to meet bacterial source reduction goals; this would better inform the Board of permittee activities toward meeting final WLAs.

Lastly, we would point out the City of Upland is within the MSAR watershed and should be included on the list of permittees in Part V.D.1.a of the permit. The word “Ana” is also missing from the title of Part V.D.1.a.

(2) Big Bear Lake Nutrient TMDL

In Part V.D.2.h, the permit indicates that compliance with the WLA would be determined by watershed modeling. We recommend additional clarification and detail in the fact sheet/permit as to how this would be conducted. We presume data from the “representative urban source monitoring locations” referred to in Attachment 5 (section F.2.b.) would be used. Please also indicate if new monitoring locations will be selected, or whether particular locations in the monitoring program that were approved on May 22, 2009 would suffice.

Part V.D.2.i of the draft permit requires certain additional steps to comply with the WLA if exceedances of the WLA are determined through watershed monitoring. We suggest that exceedances predicted through the modeling required by Part V.D.2.h also be a trigger for the additional evaluation and report with proposed additional actions as required by Part V.D.2.i.

Lastly, we would note that a reference to the bacteria TMDL appears to have been inadvertently included in the section of Attachment 5 (F.2.b) to the permit which addresses the nutrient TMDL.

(3) Big Bear Lake Mercury TMDL

Although this TMDL remains to be completed, the permit requires certain activities to minimize mercury discharges prior to completion. Finding F.5.d for the permit refers to a requirement for a Watershed Action Plan to be prepared and implemented by the permittees. However, this requirement does not seem to be reflected in the permit itself (Part V.D.4), and we would recommend clarification of this matter.

Part V.D.4.a should clarify the intent of the permit in classifying the construction sites discharging into Big Bear Lake as "high priority." Perhaps, "high priority" has the same meaning here as in Part X.B of the permit for certain other construction sites considered "high priority", but this should be clarified.

We appreciate the opportunity to provide input on this draft permit. If you would like to discuss these comments, please contact John Tinger at (415) 972-3518, or Eugene Bromley at 415-972-3510.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas E. Eberhardt", with a stylized flourish at the end.

Douglas E. Eberhardt, Chief
NPDES Permits Office